No. 88-849

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, *et al.*,
Petitioners

v.

OTIS R. BOWEN, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Paperwork Reduction Act of 1980 and its predecessor statute authorize the Office of Management and Budget, in overseeing federal paperwork, to substitute its substantive judgment for that of the Secretary of the Department of Health and Human Services with respect to the enforcement of federal civil rights legislation that is specifically entrusted by Congress to that agency, when the authority at issue is exercised outside the Administrative Procedure Act and nullifies an existing legislative rule.

PARTIES TO THE PROCEEDING

In addition to parties named in the caption, other petitioners are the Coalition of Senior Adults, the Gray Panthers, and the Legislative Council of Older Americans.

Other respondents are Joseph R. Wright, Jr., Director of the Office of Management and Budget (succeeding to the duties of James C. Miller III on November 1, 1988).

There are no entities to be listed pursuant to Rule 28.1.

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IN THE

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OCTOBER TERM, 1988

No. ———

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, *et al.*,

Petitioners

v.

OTIS R. BOWEN, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner Action Alliance of Senior Citizens of Greater Philadelphia respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled proceeding on May 13, 1988.

OPINIONS BELOW

The opinion of the court of appeals of which review is sought (App. A) is reported at 846 F. 2d 1449 (D.C. Cir. 1988). That ruling upheld the order and judgment of the district court of May 26, 1987 (App. D, E) which is unreported. A previous opinion of the court of appeals, reversing the district court's ruling on petitioners' standing to maintain this action, is reported at 789 F.2d 931 (D.C. Cir 1986). Orders of the court of appeals denying rehearing and suggestion of rehearing en banc (App B, C) of July 25, 1988 are unreported.

JURISDICTION

The opinion of the court of appeals was entered on May 13, 1988 (App. A). The petition for rehearing and

suggestion of rehearing en banc were denied on July 25, 1988. On October 18, 1988, Chief Justice Rehnquist entered an order extending petitioners' time to file this petition to and including November 22, 1988. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331 and 1361 and 42 U.S.C. § 6105.

STATUTORY PROVISIONS INVOLVED

The Appendix sets out relevant provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 et seq. (App. F, 34a-37a), the Federal Reports Act of 1976, 44 U.S.C. § 3501 et seq. (App. G, 38a-39a), the Age Discrimination Act of 1975, 42 U.S.C. § 6101 et seq. (App. H, 40a-43a), and the Administrative Procedure Act, 5 U.S.C. § 553 (App. I, 44a-45a).

STATEMENT

1. The Age Discrimination Act of 1975 (ADA) is a civil rights statute that prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance, 42 U.S.C. § 6101 (1982). Enactment of the ADA was motivated by Congressional recognition that age discriminatory policies and practices impair the ability of older persons to take full advantage of federally-supported services and benefits. 42 U.S.C. § 6107. The ADA does not apply to employment practices.

The ADA's prohibitions against discrimination on the basis of age are not self-executing. The statutory scheme anticipates implementation through two administrative events. First, the Secretary of Health and Human Services (Secretary)[1] must promulgate general regulations applicable to all federal departments and agencies. 42

[1] The Department of Health and Human Services succeeded to the duties of the Department of Health, Education, and Welfare. 20 U.S.C. § 2508 (1982).

U.S.C. § 6103(a)(1). The Secretary proposed general regulations on December 1, 1978. 43 Fed. Reg. 56,428, and published final general regulations on June 12, 1979. 44 Fed. Reg. 33,776 (codified at 45 C.F.R. § 90).

Second, the ADA requires each federal agency to issue regulations specific to its recipients, using the general regulations as a model. 42 U.S.C. § 6103(a)(4). Agency-specific regulations must be consistent with the general regulations and, to assure consistency, must be approved by the Secretary before becoming effective. 42 U.S.C. § 6103(a)(4). Agency rulemaking at each level must follows the dictates of the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq. *Id.*

The general regulations contain a provision known as the self-evaluation requirement at issue in this case. 45 C.F.R. § 90.43(b). The provision requires each agency to require its recipients to perform a one-time self-evaluation which identifies age distinctions in the recipient's programs, justifies the distinctions or takes corrective action, and makes the information available to the agency and the public for three years. *Id.*

The Secretary proposed a second set of ADA regulations, specific to HHS, on September 24, 1979, 44 Fed. Reg. 55,109, which repeated the self-evaluation provision of the general regulations. Thereafter the Office of Management and Budget (OMB) prepared a memorandum dated February 14, 1980 (OMB Memorandum), disapproving the general regulations' self-evaluation requirement.

The Secretary issued final HHS-specific regulations on December 28, 1982. 47 Fed. Reg. 57,858 (codified at 45 C.F.R. § 91). The final rules deleted the mandatory self-evaluation requirement. The only explanation for the Secretary's action appears in the preamble to the

final regulations in a one-sentence reference to the Paperwork Reduction Act.[2]

The Paperwork Reduction Act, effective April 1, 1981, authorizes OMB in certain circumstances to disapprove an agency proposal involving a "collection of information" by determining that it is "unnecessary, for any reason." 44 U.S.C. § 3508. However, OMB authority "shall be exercised consistent with applicable law." 44 U.S.C. § 3504(a). The Federal Reports Act, the predecessor statute to the PRA, contained materially similar provisions. 44 U.S.C. § 3506 (1976). The PRA made procedural changes affecting OMB review and added the provision that the law does not increase the authority of OMB "with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any federal agency to enforce the civil rights laws." 44 U.S.C. § 3518(e).

2. Petitioners commenced this action in February, 1983 against the Secretary and the Director of OMB. The action challenged the Secretary's elimination of the self-evaluation requirement from the HHS-specific regulations as a violation of the consistency requirement of the ADA, 42 U.S.C. § 6103(a)(4), and of the Administrative Procedure Act.[3]

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[2] The Preamble states: "The change is based upon HHS' determination that to be consistent with the requirements of the Paperwork Reduction Act of 1980, enacted after the publication of the NPRN (sic) the paperwork burden associated with the self evaluation must be limited to recipients where circumstances indicate, in connection with a compliance review or complaint investigation, the need for the self-evaluation." 47 Fed. Reg. at 57,852. HHS has not exercised its discretion to require any recipient to perform a self-evaluation.

[3] Additional claims not raised in this petition include (1) that elimination of the self-evaluation provision in the final HHS regulations improperly varied from proposed regulations; (2) that the final HHS regulations improperly altered other provisions required by the general regulations and (3) that the Secretary had failed to act on other agencies' proposed regulations which had been submitted for approval.

On March 19, 1984, the district court dismissed petitioners' challenge to the final HHS regulations for lack of standing, but permitted petitioners to challenge the Secretary's inaction on other proposed agency regulations awaiting the Secretary's approval. On December 28, 1984, the district court dismissed these remaining claims as moot after the Secretary approved, or conditionally approved, 19 agencies' proposed regulations.

In a first appeal, the court of appeals below held that petitioners alleged sufficient injury to their interests to establish their standing to raise all claims. 789 F.2d at 942-43 and n.14.

On remand, the district court granted the government's motion for summary judgment and dismissed the complaint on May 26, 1987. It ruled that the OMB memorandum of February 14, 1980 was a valid exercise of authority under the Federal Reports Act, that the memorandum rendered unenforceable the self-evaluation requirement of the general regulations, and that the memorandum by itself concluded the need for further proceedings under the APA with respect to both the general and the HHS regulations.

In a second appeal, the decision below affirmed the district court. It held that OMB's issuance of the 1980 memorandum rendered the self-evaluation regulation "legally void" under the Federal Reports Act. 846 F.2d at 1453. It noted that OMB holds the same substantive power under the Paperwork Reduction Act as it did under the Federal Reports Act. *Id.* It construed OMB authority with respect to a "collection of information" to apply to any general or specific requirement for the *establishment or maintenance* of records which are to be used *or be available for use* in the collection of information," whether or not such records are actually submitted to a federal agency (emphasis in original). *Id.* at 1453-54.

The decision below further ruled that OMB had properly exercised its disapproval authority by finding the self-evaluation requirement to lack "practical utility" rather than the statutory standard that the collection is "unnecessary," and that the veto authority extends to legislative rules promulgated by another agency. *Id.* at 1454. It further ruled that the limitation under 44 U.S.C. § 3518(e), disclaiming any increase in OMB authority over substantive policies and programs of agencies, does not affect OMB's nullification of the self-evaluation regulation. *Id.* at 1454-55.

The court of appeals divided over the validity of the Secretary's action under the APA. First, the court held that no amended rulemaking was necessary with respect to the rescission of the self-evaluation requirement from the general regulations; the court determined that OMB, and not the Secretary, had effected the rescission, and that OMB need not initiate rulemaking on its own. *Id.* at 1455. Second, the panel majority held that the Secretary's elimination of the self-evaluation requirement from final HHS regulations was a "logical outgrowth" of its inclusion in proposed HHS regulations, and thus did not require a second round of notice and comment rulemaking. Chief Judge Wald dissented, urging instead that the case be remanded "with instructions that HHS seek comment on its proposed modification to the mandatory self-evaluation requirement." *Id.* at 1458-59.

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important question of law concerning the authority of the Office of Management and Budget (OMB) in its regulation of federal paperwork to overrule substantive law enforcement policies of federal agencies. The court below concluded that OMB has such authority through its review of federal agency collection of information under the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 (1982), and its

predecessor, the Federal Reports Act, 44 U.S.C. § 3501 (1976), even where the information at issue is not collected by the agency. The ruling applies even to a legislative rule which has been promulgated by an agency to carry out its enforcement responsibilities under a civil rights law. If the decision stands, it will empower OMB to overrule any agency requirement involving a private gathering or maintenance of information. The decision adopts a novel and expansive view of OMB power and disturbs Congressional determinations about the role of federal agencies in the administration of laws.

The decision below creates a serious conflict in principle with the decision of the Court of Appeals for the Third Circuit in *United Steelworkers of America, AFL-CIO-CLC* v. *Pendergrass, et al.*, 855 F.2d 108 (1988) (pet. for reh. pending). In reviewing a similar agency information requirement which OMB disapproved under the asserted authority of the Paperwork Reduction Act, *Steelworkers* held that OMB cannot, in the guise of reducing federal paperwork, substitute its own judgment for that of the agency having substantive rulemaking responsibility under an independent statute.

Review also is warranted because the decision below allows a bypass of standards established by this Court for an agency's rescission of regulations under the Administrative Procedure Act, 5 U.S.C. 551 et seq. The decision erroneously allows OMB, by unpublished memorandum and without any public accountability, to void a duly promulgated legislative rule and permits its rescission in a manner which conflicts with the decision of this Court in *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Auto Insurance Company*, 463 U.S. 29 (1983).

1. OMB authority does not extend to the regulation at issue. The regulation mandates each federal agency to promulgate regulations which, in turn, would require recipients of federal funds to conduct a one-time self-

evaluation of its compliance with the ADA. 45 C.F.R. § 90.43(b). The Secretary published final regulations applying the ADA to HHS recipients but, in so doing, deleted the self-evaluation requirement, 45 C.F.R. § 91.33 (b). Petitioners challenge the deletion as inconsistent with the general regulations and therefore impermissible under the ADA. 42 U.S.C. § 6103(a)(4).

The decision below expands the authority of OMB to disapprove an agency's "collection of information" beyond the parameters of the Paperwork Reduction Act. The decision defines a "collection of information" by a federal agency so broadly that it covers information collected by private parties under an agency regulation to secure compliance with law, even if the information is not transmitted to the agency or collected by it. A requirement that recipients engage in data-gathering or record-keeping, according to the decision, falls under OMB's power to disapprove it, even though that information does not involve "physical delivery to an agency." 846 F.2d at 1454.[4] By overlooking the essential element of transmission of information to an agency, the decision below opens the door to OMB veto of virtually any federal agency requirement which involves a writing by private parties. Neither the language nor the history of the PRA or its predecessor, the Federal Reports Act, indicates their application to record-keeping requirements which are not transmitted to an agency.[5]

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[4] The focus of the decision below on the Federal Reports Act rather than the Paperwork Reduction Act, on which the Secretary relied, is not consequential on the issue of OMB authority. The decision notes that the substantive authority of OMB is the same under both statutes. 846 F.2d at 1453. Both statutes treat the "collection of information" by federal agencies, the scope of which is not changed by the PRA. S. Rep. No. 96-930, 96th Cong., 2d Sess. 39, *reprinted in* [1980] U.S. Code Cong. & Adm. News 6241, 6279.

[5] The PRA defines "collection of information" to mean "the obtaining or soliciting of facts or opinions by an agency . . . ." 44 U.S.C. § 3502(4). The FRA similarly defined "information" with-

Even if the self-evaluation requirement at issue is found to constitute a collection of information under the statute, OMB's power to disapprove cannot extend absolutely to a substantive regulation entrusted by law to the Secretary. The Secretary issued the requirement in the general regulations as a legislative rule pursuant to express delegation in the ADA, 42 U.S.C. § 6103(a)(1), and having the force and effect of law. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 304 (1979).

After the Secretary had implicitly determined the necessity of the self-evaluation requirement in order to carry out the purposes of the ADA, OMB disapproved the requirement because, in OMB's view, it lacked "practical utility." To empower OMB to veto on paperwork grounds what the Secretary found necessary to effectuate civil rights legislation exceeds the language and purpose of the PRA. The statute expressly provides that OMB must exercise authority thereunder "consistent with applicable law." Moreover, the PRA explicitly disclaims any increase in OMB authority ". . . with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws." 44 U.S.C. § 3518(e). The legislative history emphasizes the distinction between OMB coordination of federal paperwork and improper interference with the enforcement of

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out defining "collection" with respect to forms "which are to be used for statistical compilations of general public interest." 44 U.S.C. § 3502 (1976). OMB authority extended to "the collection of information by a Federal agency." 44 U.S.C. § 3506 (1976).

The decision below observed that a 1943 regulation of OMB's predecessor, the Bureau of the Budget, had described records subject to its review as those ". . . to be used or be available for use in the collection of information." 846 F.2d at 1454. That definition by its terms rested on a collection of information by an agency, and did not extend OMB oversight to records compiled but not collected.

law by the agencies.[6] The decision below blurs this distinction and disturbs Congressional choices about the proper administration of statutes.[7]

2. Review is also warranted because the decision below creates a serious conflict in principle with the decision of the Court of Appeals for the Third Circuit in *Steelworkers*. That case involved a challenge to OMB disapproval under the Paperwork Reduction Act of a hazard communication standard promulgated pursuant to the

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[6] This concern is articulated in the Senate Committee Report in passage of the PRA :

"It has been argued that the Federal Reports Act—which S.1411 amends—was used to interfere with regulatory policy under the guise of clearing information requests. . . .

The bill has provisions to guard against that. Section 3518(e) provides that the bill does not affect in any way the powers of the President or OMB respecting the substance of agency policies. Thus S. 1411 draws an important distinction between paperwork management and substantive decisions." S. Rep. No. 96-930, 96th Cong., 2d Sess. 56, *reprinted in* [1980] U.S. Code Cong. & Adm. News 6296. As the decision below notes, under the PRA, in effect when the Secretary adopted HHS-specific regulations, OMB holds the same substantive power as it did under the Federal Reports Act. 846 F.2d at 1453.

[7] The Secretary published HHS-specific regulations when the PRA had come into effect, and referenced only the PRA as the basis for his action in eliminating the self-evaluation requirement. 47 Fed. Reg. 57,852 (1982). The Secretary published general regulations under the ADA on June 12, 1979, 44 Fed. Reg. 33,776, and HHS-specific proposed regulations on September 24, 1979. 44 Fed. Reg. 55,109. OMB's disapproval memorandum to HHS is dated February 14, 1980. The Paperwork Reduction Act superseded the Federal Reports Act effective April 1, 1981. Pub. L. 96-511, 94 Stat. 2812, codified at 44 U.S.C. 3501 et seq.

The February, 1980 OMB memorandum on which the government relies as its legal basis for acting was never published. It appeared in this case only as attachment to *petitioners'* pleadings in support of their claim of improper interference by OMB in the Secretary's substantive rulemaking. Four years after the fact, the government first cited the OMB memorandum as a basis for its action.

Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1982). The standard required employers at multi-employer worksites to exchange workplace safety information previously available to them. The court determined that OMB lacked authority to disapprove the standard because it did not require a "collection of information" and because it embodied a substantive policy decision entrusted to the agency. 855 F.2d at 112. The decision below conflicts with both issues decided in *Steelworkers.*

Steelworkers held that a requirement imposed on employers to exchange information, but not to compile it or to submit it to the agency, is not a "collection of information" under the PRA. *Id.* While *Steelworkers* did not involve the facts in this case, its reasoning would produce a different result here. The court noted pointedly that related OSHA standards required chemical manufacturers to collect and exchange information, and required employers to collect and maintain information, and that only a "far-fetched interpretation" of the PRA would hold these activities within its coverage. *Id.* at 113. The decision below, in direct contrast, holds that a requirement that involves record-keeping, but not transmittal to the agency, nonetheless constitutes a "collection of information" subject to OMB disapproval. 846 F.2d 1453-54.

Far from being a technical requirement, the submission of data to a federal agency is critical to its coming within the ambit of federal paperwork subject to the statute. Once this element drops out, OMB authority over regulatory matters becomes nearly limitless. This view would expand OMB authority to *any* agency regulation of private conduct which involves a requirement of written entries. Such a result is at a complete remove from the purpose of the PRA and its predecessor statute to coordinate paperwork required by the federal government for its own statistical purposes. *Steelworkers* re-

jected this broad construction of the PRA, seeing that otherwise it would permit OMB in the guise of reducing paperwork to "substitute its judgment for that of the agency having substantive rulemaking responsibility for such matters as drug or food labeling, drug package inserts, proxy statement disclosures, or the contents of registration statements." *Id.*

Steelworkers further held that even if the OSHA standard constituted a "collection of information," OMB disapproval authority did not extend to it. It found a Congressional disaffirmance in the PRA of any intention to grant substantive lawmaking authority to OMB, noting that OMB authority "shall be exercised consistent with applicable law," 44 U.S.C. § 3504(a), and that OMB authority is not increased over the "substantive authority of any federal agency to enforce the civil rights laws." 44 U.S.C. § 3518(e).

The decision below rests on an opposite construction of the PRA. It reads the PRA to confer unchecked power in OMB to overrule the substantive policy decisions of another agency charged with a statute's enforcement. It reasons that the PRA does not "completely exempt any civil rights activity" from OMB supervision, and then concludes erroneously that OMB veto authority is absolute, despite § 3518(e). 846 F.2d at 1454-55. In § 3518(e), like § 3504(a), however, Congress delineates the proper function of OMB in coordinating the flow of federal paperwork but places out of bounds its intrusion into substantive agency enforcement policy.[8] The decision below renders both statutory provisions a nullity

[8] Petitioners make no contention that civil rights activity is "exempt" from the PRA. The PRA might extend OMB authority, e.g., to a duplicative reporting requirement affecting multiple federal agencies. It does not substitute OMB as the agency which makes the policy choice between the need for private record-keeping in statutory enforcement and a private party's interest in not providing such information.

and, in so doing, conflicts directly with the decision in *Steelworkers.*[9]

That *Steelworkers* focuses on OMB authority under the Paperwork Reduction Act, and the decision below on the Federal Reports Act, does not lessen the conflict. The Secretary's challenged action occurred in 1983 under the PRA and sought justification only in the PRA. In all events, the substantive power of OMB under the PRA and its predecessor Federal Reports Act is the same. 846 F.2d at 1453. Both laws apply to the "collection of information" by the federal government, the scope of which is the same under both statutes. S. Rep. No. 96-930, *supra.* The PRA limits the exercise of OMB authority to that "consistent with applicable law" under § 3504(a). The Federal Reports Act confers no authority in OMB to substitute its choices on matters of substantive policy for those of the agency in matters entrusted to it. *See* 44 U.S.C. §§ 3506, 3509 (1976). The broad construction given OMB authority in the decision below conflicts directly with the principle enunciated in *Steelworkers.*

3. In addition, the Secretary has effectively rescinded the self-evaluation regulation while bypassing APA procedures, in conflict with this Court's decision in *State Farm.* Compliance with the APA is not a technicality that can be so casually discarded. Notice and opportunity for public comment are critical to the validity and public accountability of all agency rulemaking. *State Farm* makes clear that informal rulemaking standards apply to the rescission or modification of a substantive regulation already promulgated, whether or not that

[9] Although the questions presented in this petition by itself are important and warrant review by this Court, petitioners respectfully request that dispositive action on the petition await a final resolution in *Steelworkers.* That case remains pending before the Court of Appeals for the Third Circuit on petitions for rehearing with suggestion for hearing en banc, filed on September 2, 1988.

Those petitions were denied on November 28, 1988, subsequent to the filing of this petition for a writ of certiorari.

regulation has become effective. 463 U.S. at 38. The decision below obliterates APA requirements. While such a result would cause concern if any agency improperly rescinded or modified a rule it had promulgated, there is greater cause for concern where OMB overrides an agency's expertise and, under the guise of the Paperwork Reduction Act, substitutes its views for the informed views of an agency specifically entrusted with civil rights law enforcement responsibility.

The Secretary promulgated the self-evaluation requirement with an expansive discussion of its central role in ADA enforcement.[10] The Secretary eliminated the same requirement from HHS-specific regulations with a one-sentence reference to the Paperwork Reduction Act, on which the Secretary no longer relies. This fails to satisfy the minimal standards articulated in *State Farm*.

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[10] The preamble to the proposed general regulations contains a six-paragraph analysis of the self-evaluation requirement, its purpose, the recipient's responsibilities, and further issues for comment. 43 Fed. Reg. 56,437 (Dec. 1, 1978). The preamble to the final general regulations contains a seven-paragraph analysis of comments on the need for self-evaluations, for recipient guidelines, the time for completion, and the size of recipients covered by the requirement. 44 Fed. Reg. 33,770 (June 12, 1979).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5251

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADLEPHIA, *et al.*,
Appellants

v.

OTIS R. BOWEN, *et al.*

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 83-00285)

Argued February 9, 1988

Decided May 13, 1988

Burton D. Fretz, with whom *Toby S. Edelman* and *Bruce M. Fried* were on the brief, for appellants.

Marleigh D. Dover, Attorney, Department of Justice with whom *Richard K. Willard*, Assistant Attorney General, *Joseph E. diGenova*, United States Attorney and *John F. Cordes*, Attorney, Department of Justice were on the brief, for appellees.

Before: WALD, *Chief Judge*, and STARR and WILLIAMS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Opinion dissenting in part filed by *Chief Judge* WALD.

WILLIAMS, *Circuit Judge*: For the second time, we consider a challenge by the Action Alliance of Senior Citizens of Greater Philadelphia and three other senior citizen groups (here referred to collectively as the "Action Alliance") to certain regulations promulgated by the Department of Health and Human Services pursuant to the Age Discrimination Act, Pub. L. No. 94-135, 89 Stat. 728 (1975) (codified as amended at 42 U.S.C. § 6101 *et seq.* (1982)).

The Act generally prohibits recipients of federal funds from discriminating against persons on account of their age with regard to all benefits except employment. It laid out three steps for implementation. First, the U.S. Commission on Civil Rights was to conduct a study to identify instances of age discrimination in federally-funded programs and to report its findings to Congress and the President. 42 U.S.C. § 6106(a). The Commission transmitted its report in January 1978. 43 Fed. Reg. 8,756 (1978).

At the next step, the Act required HHS [1] to promulgate "general" regulations. 42 U.S.C. § 6103(a)(1). These were to serve as a model for "agency-specific" regulations—ones to be issued by the various federal agencies for their own programs, 42 U.S.C. § 6103(a)(4). HHS gave notice of proposed general regulations in December 1978, 43 Fed. Reg. 56,428 (1978), and promulgated final ones in June 1979, 44 Fed. Reg. 33,776 (1979), codified at 45 C.F.R. Part 90 (1987).

Third, the Act required each agency of the federal government to issue its agency-specific regulations within 90 days of the promulgation of final general regulations.

[1] The Act referred to the Department of Health, Education and Welfare, but that was supplanted in 1980 for these purposes by HHS. *See* 20 U.S.C. § 3508 (1982).

42 U.S.C. § 6103(a)(4). These were required to be "consistent" with the general regulations, and were to take effect only when approved by the Secretary of HHS. *Id.* HHS, in this respect just another federal agency, proposed its own agency-specific regulations in September 1979, 44 Fed. Reg. 55,108 (1979), and promulgated final ones in December 1982, 47 Fed. Reg. 57,858 (1982), codified at 45 C.F.R. Part 91 (1987).

The Action Alliance filed suit for declaratory and injunctive relief against the Secretary of HHS and the Director of the Office of Management and Budget in February 1983, alleging (1) that the final HHS-specific regulations were inconsistent with the Act, the general regulations, and the proposed HHS-specific rules, and (2) that the defendants had unlawfully failed to approve or act on other agencies' agency-specific regulations. In December 1984, the district court granted the government's motion to dismiss the three HHS-specific claims for want of standing. *Action Alliance of Senior Citizens v. Heckler*, No. 83-0285, slip op. (D.D.C. Mar. 19, 1984) *reprinted in* Joint Appendix ("J.A.") at 43. Nine months later, the district court dismissed the inaction claims as moot; by then the agency had acted. *Action Alliance of Senior Citizens v. Heckler*, No. 83-0285, slip op. (D.D.C. Dec. 28, 1984), *reprinted in* J.A. at 52-60. On appeal, this court affirmed the mootness decision, but reversed the standing determination and remanded the HHS-specific claims. *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986). On remand, the district court granted summary judgment on the merits in favor of the agency. *Action Alliance of Senior Citizens v. Bowen*, No. 83-0285, slip op. (D.D.C. May 26, 1987), *reprinted in* J.A. at 143-53.

The appeal raises two discrete issues.[2] First, the Action Alliance challenges the agency's decision to strike

[2] Appellants attempt to raise a third issue on appeal: they contend that the Secretary's *approval* of *other* agencies' agency-specific

from the final HHS-specific regulations the mandatory self-evaluation requirement that had been in the general regulations and the proposed agency-specific regulations. HHS responds that its action was obligatory because the Office of Management and Budget had properly eliminated the requirement as unnecessarily burdensome for federal fund recipients, pursuant to the Federal Reports Act, Pub. L. No. 77-381, 56 Stat. 1078 (1942) (codified at 44 U.S.C. § 3501 *et seq.* (1976)). Second, the Alliance argues that HHS's insertion of the phrase "upon request" into the provision requiring recipients to furnish compliance data renders the HHS-specific regulations inconsistent with the general ones. We reject both theories.

I. The Self-Evaluation Provision

The final government-wide regulations contained a provision requiring all recipients of federal funds to complete a "written self-evaluation of its compliance under the Act." 45 C.F.R. § 90.43(b) (1987). They required recipients to "identify and justify each age distinction imposed," to "take corrective and remedial action whenever a self-evaluation indicates a violation of the Act," and to "make the self-evaluation available on request to the agency and to the public" for three years. *Id.* The self-evaluation requirement in the HHS-specific regulations proposed by the Secretary in September 1979

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regulations constitutes an abuse of discretion because those regulations are inconsistent with the Act and/or the general regulations. Appellants' Brief at 34-36.

This issue is not properly before the court at this time. In affirming the district court's mootness determination as to HHS's inaction on the other agencies' regulations, we noted that appellants could amend their complaint with the district court's permission to add new counts challenging the Secretary's approval of other agencies' regulations. *Action Alliance*, 789 F.2d at 943-44 n.15. There is no suggestion in the record (or in the appellants' brief) that appellants ever tried to do so. Appellants cannot appeal an issue that was never before the district court.

closely tracked the government-wide regulation; the only change was to substitute "HEW" (the predecessor agency's abbreviation, *see supra* note 1) for the general term "agency." 44 Fed. Reg. 55,116. The final HHS-specific regulations, however, gave HHS *discretion* to require self-evaluation in particular cases. It stated:

> As part of a compliance review . . . or complaint investigation . . . HHS *may* require a recipient . . . to complete a written self-evaluation, in a manner specified by the responsible Department official, of any age distinction imposed in its program or activity receiving Federal financial assistance from HHS to assess the recipient's compliance with the Act.

45 C.F.R. § 91.33(b)(1) (emphasis added). HHS explained the change as being

> based upon HHS determination that to be consistent with the requirements of the Paperwork Reduction Act of 1980, enacted after the publication of the NPRN [sic; NPRM?], the paperwork burden associated with the self-evaluation must be limited to recipients where circumstances indicate . . . the need for the self-evaluation.

47 Fed. Reg. at 57,852.

Although this explanation was not false, it left out a few steps. First, between the publication of the proposed HHS-specific regulations in September 1979 and the promulgation of the final regulations in December 1980, the *Office of Management and Budget* had issued a memorandum disapproving of the mandatory self-evaluation requirement contained in the *general regulations*. Second, at that point OMB was in fact not operating under the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. § 3501 *et seq.* (1982) (the "Paperwork Act"), but under its predeces-

sor, the Federal Reports Act, 44 U.S.C. § 3501 *et seq.* (1976) (the "Reports Act"), which was in effect from 1942 until April 1, 1981. But, because of the relation between the Reports Act and the Paperwork Act, and OMB's role under both, the OMB memorandum compelled HHS's belief that if agency-specific regulations contained mandatory self-evaluation they would neither satisfy the consistency requirement of the Age Discrimination Act nor survive OMB scrutiny under the Paperwork Act.

This is why: The Reports Act denied legal effect to any compulsory agency "collection of information" unless the Director of OMB had approved the proposed collection. 44 U.S.C. § 3509 (1976).[3] The Director could disapprove the proposed collection of information if he or she determined it to be "unnecessary, for any reason." 44 U.S.C. § 3506 (1976).[4] The Director so found in a memorandum issued February 14, 1980. (We deal below with a complaint based on his failure to use the word "unnecessary.")

OMB's issuance of the memorandum of itself negated the general self-evaluation requirement. Two propositions followed. Any universal self-evaluation clause in agency-specific regulations would be most unlikely to win OMB sanction. Under the Paperwork Act (in effect at

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[3] 44 U.S.C. § 3509 (1976) provided that "[a] Federal agency may not conduct or sponsor the collection of information . . . unless (1) the agency has submitted to the Director [of OMB] the plans or forms, together with copies of pertinent regulations and of other related materials as the Director . . . has specified; and (2) the Director has stated that he does not disapprove the proposed collection of information."

[4] 44 U.S.C. § 3506 (1976) stated that "the Director of [OMB] may determine whether or not the collection of information by a Federal agency is necessary for the proper performance of the functions of the agency or for any other proper purpose. . . . To the extent, if any, that the Director determines the collection of information by the agency is unnecessary, for any reason, the agency may not engage in the collection of the information."

adoption of the final agency-specific regulations) OMB holds the same substantive power as it did under the Reports Act. Where it determines that collection of information is unnecessary, the agency may not proceed with the collection. 44 U.S.C. § 3508 (1982).[5] Moreover, agency inclusion of such a clause in its own regulations would seem to violate 42 U.S.C. § 6103(a)(4)'s requirement that agency-specific regulations be "consistent" with the general ones—which since February 1980 lacked any legally effective mandatory self-evaluation clause. (This second point assumes, of course, that § 6103(a)(4)'s "consistency" was to be with the lawful aspects of the general ones, not with clauses promulgated but legally void.)

The Action Alliance nevertheless attacks the final HHS-specific regulation on a number of grounds. Four arguments, all relating to the legality of OMB's disapproval of the self-evaluation requirement, may be disposed of without extended comment.

First appellants object that the mandatory self-evaluation requirement did not entail a "collection of information" within the meaning of the Reports Act. 44 U.S.C. §§ 3506, 3509 (1976). The clause that OMB nullified, they say, only required recipients to perform a self-evaluation and to "make the self-evaluation available on request to the agency and to the public," 45 C.F.R.

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[5] 44 U.S.C. § 3508 (1982) provides:

> Before approving a proposed information collection request, the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of information.

§ 90.43(b)(4), not to submit the data to the agency. The claim is pure pettifoggery. Appellants cannot seriously believe that in enacting the Reports Act Congress was concerned solely or primarily with private parties' costs of *mailing* data to Washington; it is the record-keeping and data-gathering that constitute the burden. Moreover, OMB and its predecessor, the Bureau of the Budget, have interpreted the statutory term "collection of information" for nearly half a century to encompass "[a]ny general or specific requirement for the *establishment or maintenance* of records . . . which are to be used *or be available for use* in the collection of information." Regulation A, Federal Reporting Services, Clearance of Plans and Reports Forms, Title I(1)(e) (February 13, 1943), *reprinted in* Appendix to HHS Brief ("Regulation A"). Even under the deference we owe the agency, *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984), we doubt we could uphold a view of the Reports Act that made physical delivery to an agency essential to the notion of "collecton of information." Happily we confront no such oddity.

Second, appellants note that the Reports Act authorized OMB to bar collection of information only where it found the collection "unnecessary," 44 U.S.C. § 3506 (1976), and object that OMB's memorandum of disapproval did not employ that term. But the Director's memorandum found that HHS had "failed to show the practical utility of the requirement." J.A. at 89. OMB has since 1943 used the "practical utility" standard to determine whether collections of information are "unnecessary," Regulation A, Title III(3)(c), and its regulations specify that "withholding of clearance shall constitute . . . a determination in pursuance of section [3506] of the [Reports Act] that the collection of information in the manner proposed is unnecessary," *id.* at Title I(1)(h). OMB pushed the magic button as well as it needed to.

Third, appellants claim the existence of an unwritten exception to OMB's power under the Reports Act (and, by implication, the Paperwork Act) for what it calls "duly promulgated legislative rules." Appellants' Reply Brief at 2; *see also* Appellants' Brief at 13-14. We find no basis whatever for this view. The Reports Act contains no suggestion of an exception for legislative rules: on its face it applies to *any* "collection of information" by an agency. 44 U.S.C. §§ 3506, 3509 (1976); for the Paperwork Act, *see* 44 U.S.C. § 3502(4) (1982). Nor would a "legislative rules" exception further the Reports Act's purpose. Were we to manufacture such an exception, it would allow agencies to circumvent OMB review of burdensome information requirements merely by proposing them as rules published in the Code of Federal Regulations and inviting comment.[6] This outcome would be directly contrary to the Reports Act's goal that OMB ensure that "[i]nformation needed by Federal agencies . . . be obtained with a minimum burden upon business enterprises . . . and other persons." 44 U.S.C. § 3501 (1976).

The Paperwork Act confirms this view. It assumes that rules entailing collection of information will be adopted pursuant to notice-and-comment rulemaking. *See* 44 U.S.C. § 3504(h)(1) (1982) (requiring agency so proposing to forward a copy to the Director of OMB). Under the Administrative Procedure Act, as Congress obviously knew, such rulemaking exists primarily for "legislative" rules, since most alternatives—interpretive rules or rules of agency procedure—are exempt. 5 U.S.C. § 553(b)(3)(A) (1982). It would be a bizarre anomaly

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[6] The Reports Act itself made provision for public input into OMB review of information programs. Section 3506 provided in part that, "Before making a determination [of necessity], [the Director of OMB] may give the agency and other interested persons an opportunity to be heard or to submit statements in writing." 5 U.S.C. § 3506 (1976).

to find a legislative rules exception to the Reports Act now that it has run its course, when its successor plainly contemplates no such exception.

The Alliance raises a fourth claim closely related to its proposed legislative rules exception. Noting that the Paperwork Act says that nothing in it shall be "interpreted as increasing or decreasing the authority of the [OMB Director] with respect to the substantive policies and programs of departments . . . including the substantive authority of any Federal agency to enforce the civil rights laws," 44 U.S.C. § 3518(e) (1982), it suggests that OMB lacks Paperwork Act authority to restrict data-collection programs undertaken with respect to civil rights laws. But such a review of § 3518(e) would completely exempt any civil rights activity from OMB's data collection supervision; § 3518(e)'s language is inadequate to carve so large a slice from OMB's authority.

We finally turn to appellants' most interesting challenge. They argue that HHS's change in the self-evaluation provisions created such a gap between the proposed and final HHS-specific rules as to have required HHS to have issued a new notice and opened a new round of comment, in order to comply with the informal rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1982). They also claim that HHS's explanation of the change falls short of § 553(c)'s requirement that agencies incorporate in adopted rules "a concise general statement of their basis and purpose."

First we address an ancillary theory. The Alliance argues that HHS illegally modified the *general* regulations without an amending rulemaking. Rule rescissions, it says, are subject to the same requirements as rule adoptions. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 41 (1983). The point is indisputable but irrelevant. HHS didn't rescind that part of the general regulations. (In fact, it

still has not tidied up the books. The mandatory version is printed in the current edition of the Code of Federal Regulations.) OMB, acting under the Reports Act, denied the mandatory provision of legal effect. Appellants do not even argue that OMB was required to proceed by notice-and-comment rulemaking; their complaint never attacked the general regulations at all. (We note that under the Paperwork Act OMB's role is fitted into the agency's notice-and-comment procedure. It may comment on proposed data collection rules. If the agency perseveres despite negative OMB comments, OMB may invalidate the collection provision if it finds that the agency's response to its comments was unreasonable. 44 U.S.C. § 3504(h)(5)(C) (1982). But it is not required to initiate a notice-and-comment procedure of its own.)

In evaluating whether a change in rules between proposal and final adoption calls for a new round of notice-and-comment,[7] we have long acknowledged practical reality. In *International Harvestor Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973), we recognized that an agency could make changes responding to comments without em-

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[7] In this litigation HHS invokes 5 U.S.C. § 553(b)(B), which allows an agency to dispense with *any* notice and comment for "good cause," if its statement of reasons for the rule includes a finding that notice and comment would be "impracticable, unnecessary or contrary to the public interest." We do not rest our decision on § 553(b)(B), however. HHS's statement of reasons did not include the finding described by § 553(b)(B). Although every decision that we can find on the point appears to have held omission of the finding not to be fatal to use of the exception, *see Kollett v. Harris*, 619 F.2d 134, 145 (1st Cir. 1980); *Nader v. Sawhill*, 514 F.2d 1064, 1068 (T.E.C.A. 1975) (Tamm, J.); *California v. Simon*, 504 F.2d 530, 539 (T.E.C.A.), *cert. denied*, 419 U.S. 1021 (1974); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1333 (T.E.C.A.), *cert. denied*, 419 U.S. 896 (1974), we can find none in this circuit. Here, in any event, the issue is whether the agency was required to initiate a *second* round. We think this more appropriately analyzed under the "logical outgrowth" principle discussed in the text below, adjusted for the presence of a supervening outside force.

barking on a new round. Judge Leventhal observed that a "contrary rule would lead to the absurdity that in rulemaking under the APA the agency can learn from the comments . . . only at the peril of starting a new procedural round of commentary." *Id.* at 632 n.51. This has crystallized in the view that changes from the proposals do not require an additional round where the final rules represent a "logical outgrowth" of the proposals. *See, e.g., Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (reviewing circuit authority.) As Judge Wald there pointed out, the task is fundamentally one of balancing the advantages of additional comment—improvements in the quality of rules, fairness for affected parties, and facilitation of judicial review—against the burden on "the public interest in expedition and finality." *Id.* at 546-47.

Here of course the change arose not from comment on proposals but from a supervening external force—the OMB memorandum. But we have no doubt that the principle applies with the same force here, as it would with a dispositive judicial decision or statutory change. Life is still short, and the interest in getting on with it still weighs against judges forcing agencies through unpromising and unnecessary procedural hoops.

Here we think HHS clearly justified in its implicit view that the plausible benefits of a new round of commentary could not justify the delay. In disapproving the mandatory self-evaluation provision of the general regulations, OMB stated that the "addition of the Age Discrimination Act to the standard assurances used in conjunction with Federal grants and increased publicity of the provisions of the Act" would be "less burdensome and costly" than the proposed one-time self-evaluation. J.A. at 89. It noted also that HHS should have examined methods of "heighten[ing] awareness" of the Act other than "a recordkeeping requirement." *Id.* The comments strongly suggest that OMB would have vetoed any record-

keeping requirement more onerous than the one HHS promulgated in its final agency-specific rules.

Finding error in HHS's failure to open a new round of comment would necessarily rest on an expectation that commenters in such a round would have proposed some recordkeeping requirements more stringent than the one adopted—allowing the agency to demand self-evaluation when appropriate—yet moderate enough to pass OMB scrutiny. It must also assume that this hypothetical middle position would represent some substantial enhancement in HHS's extraction of data from recipients. The appellants' briefs in this case render such expectations implausible. Nowhere there—or at oral argument—have they even hinted at any alternative self-evaluation requirement, much less one with a serious prospect of passing OMB's guardpost.

In its original notice of its proposed agency-specific regulation HHS (really HEW—this was before HEW split into Education and HHS) asked reviewers not to comment on the proposals identical to those in the general regulations, including, of course, the self-evaluation requirement. 44 Fed. Reg. 55,108 (September 24, 1979). This does not alter our view that HHS was free to adopt final rules without a new round of comment. Under the consistency requirement of 42 U.S.C. § 6103(a)(4), HHS's task on that issue was simple conformity to the general regulations—already adopted after full notice and opportunity to comment. Further, quite apart from the ample opportunity afforded by the earlier proceeding, comments made in ignorance of the as-yet unissued OMB memorandum would have shed no light on the options open to HHS after its issuance.

Accordingly we reject appellants' contention that HHS erred in failing to start a second round of notice-and-comment on the self-evaluation issue.

Finally, we reject appellants' claim that HHS's explanation of the change fell short of § 553's requirement of a "concise general statement of [the rules'] basis and purpose." We have described above the effect of the OMB memorandum. *See supra* pp. 5-7. HHS rather telescoped the exact legal connections. The result was indeed very concise and general, but good enough under the circumstances.

II. The Compliance Data Provisions

The government-wide regulations contain a provision directing agencies to include in their agency-specific regulations a requirement that the recipient "[p]rovide to the agency information necessary to determine whether the recipient is in compliance with the Act." 45 C.F.R. § 90.45(a). The corresponding HHS-specific regulation requires recipients to "[p]rovide to HHS, *upon request*, information and reports which HHS determines are necessary to ascertain whether the recipient is complying with the Act and these regulations." 45 C.F.R. § 91.34(b) (emphasis added). The Alliance contends that HHS's addition of the words "upon request" in its agency-specific rule violates the Act's requirement of consistency with the general regulations. 42 U.S.C. § 6103(a)(4); *see also* 45 C.F.R. § 90.31(d) (similar requirement in general regulations themselves). We disagree.

The problem with the contention is that HHS—the agency that wrote and promulgated the government-wide regulations—has consistently interpreted 45 C.F.R. § 90.45(a) *not* to require agencies to impose a mandatory periodic reporting requirement on recipients. In the explanatory statement that accompanied the final government-wide regulations, it explained § 90.45 as merely *permitting* agency requests:

> To help determine whether a recipient is in compliance with the Act, each Federal agency *may require* its recipients to make their records reasonably

> accessible to the agency and to furnish information to the agency (§ 90.45).

44 Fed. Reg. at 33,770-71 (emphasis added; the parenthetical citation to § 90.45 appears in the original text of the notice).

The Alliance's reading of § 90.45 to mandate a regular government-wide collection of data seems, by contrast, farfetched. The section specifies neither the type of data to be collected nor the timing nor frequency of collection. As a self-executing mandate, the section is woefully deficient.

Whatever we think of HHS's interpretation, we must defer to it so long as it is not "plainly erroneous or inconsistent with the regulation." *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *National Trust for Historic Preservation v. Dole*, 828 F.2d 776, 782 (D.C. Cir. 1987); *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 30 (D.C. Cir. 1986) (en banc), *cert. denied*, 107 S. Ct. 330 (1986). As we find it far more plausible than the Alliance's, it handily passes that test.

Appellants argue that HHS's interpretation of 45 C.F.R. § 90.45 cannot be correct because on that view § 90.42 would be superfluous. Even assuming that such an overlap could overcome the controlling weight we give to agencies' interpretations of their own regulations, we do not find the redundancy. Quite simply, the two provisions are directed at different actors. § 90.42 provides that, "A *recipient* . . . has responsibility to maintain records, provide information, and to afford access to its records to an agency to the extent required to determine whether it is in compliance with the Act." 45 C.F.R. § 90.42(a) (emphasis added). § 90.45 requires *agencies* to promulgate a regulation asserting the authority to compel the provision of compliance data. The two regulations are distinct enough to accommodate HHS's reading of § 90.45(a).

Once we accept the HHS interpretation of § 90.45(a), the alleged inconsistency between that regulation and § 91.34(b) vanishes. The former requires only that agencies include in their agency-specific regulations a provision obligating recipients to furnish compliance information when requested by the agency; the latter, with its "upon request" clause, fulfills the requirement.

Appellants are left with the argument that the Age Discrimination Act itself *compels* HHS to adopt rules producing annual, government-wide, mandatory collection of information from recipients detailing their compliance with the Act. The argument—so far as we can make it out—goes something like this: (1) 42 U.S.C. § 6106a(a) requires agencies to submit annual reports "containing specific data about program participants or beneficiaries, by age, sufficient to permit analysis" of how well the agency is carrying out the Act's prohibition of age discrimination; (2) § 90.45 was HHS's regulatory response to the requirement; (3) thus § 90.45 must be read to require annual "data collection which is mandatory, uniform, or regular." Appellants' Brief at 30 n.19. We do not read the Act so broadly. By its own terms § 6106a(a) requires nothing of recipients. Its only stated restriction on the type or amount of data in an agency's report is that it be "sufficient to permit analysis" of the department's success in defeating age discrimination. This hardly compels the sort of periodic mandatory collection of information the Alliance appears to have in mind.

In any event, HHS when it proposed the general regulations made clear that its response to the report requirement of § 6106a was § 90.34, *not* § 90.45. 43 Fed. Reg. at 56,435-36. § 90.34 reflects what the agency calls "a targeted approach to data collection," *id.* at 56,436/1, and articulates in some detail the required contents of

agency reports to HHS under 6106a(a).[8] The "targeted approach" to data collection relies principally on complaint data, as supplemented by "compliance reviews and in-depth investigations, as appropriate." 43 Fed. Reg. 56,436/1. In adopting this approach, HHS stated that it believed it to "be more effective than massive reporting systems." *Id.* The Alliance's construction of § 90.45 would impose on all parties just the "massive reporting system" that HHS sought to avoid in meeting § 6106a(a) by the means stated in § 90.34.

In sum, we conclude that 45 C.F.R. § 91.34 is entirely consistent with the general regulations, and that 42 U.S.C. § 6106a does not compel the mandatory collection of compliance data urged by the Alliance.

* * * *

Finding no merit in appellants' claims, we affirm the judgment of the district court.

So ordered

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[8] 45 C.F.R. § 90.34 requires each agency to submit to the Secretary of HHS a report which:

> (a) Describes in detail the steps taken during the preceding fiscal year to carry out the Act; and
>
> (b) Contains data on the frequency, type, and resolution of complaints and on any compliance reviews, sufficient to permit analysis of the agency's progress in reducing age discrimination in programs receiving Federal financial assistance from the agency; and
>
> (c) Contains data directly relevant to the extent of any pattern or practice of age discrimination which the agency has identified in any programs receiving Federal financial assistance from the agency and to progress toward eliminating it; and
>
> (d) Contains evaluative or interpretive information which the agency determines is useful in analyzing agency progress in reducing age discrimination in programs receiving Federal financial assistance from the agency; and
>
> (e) Contains whatever other data the Secretary may require.

WALD, *Chief Judge*, dissenting in part: I disagree with the majority's conclusion that the Department of Health and Human Services' (HHS) modification of its proposed regulations to implement the Age Discrimination Act (ADA), 42 U.S.C. § 6101, through self-evaluations of ADA compliance by recipients of federal monies, did not require notice and comment pursuant to § 553 of the Administrative Procedure Act (APA). 5 U.S.C. § 553.

The district court correctly held that the self-evaluation provisions are substantive rulemaking that requires § 553 public notice and comment. *See* Joint Appendix (J.A.) at 149. HHS (then HEW) fulfilled this requirement when it first proposed the government-wide, mandatory self-evaluation clause on December 1, 1978. *See* 43 *Fed. Reg.* 56,437; 44 *Fed. Reg.* 33,770 (final general regulations published June 12, 1979). However, responding to the Office of Management and Budget's (OMB) memorandum of disapproval (dated February 14, 1980), in its final agency-specific requirements, *see* J.A. at 89, HHS summarily revised the original self-evaluation requirement to make it discretionary with the agency. *See* 47 *Fed. Reg.* 57,858 (codified at 45 C.F.R. § 91). Specifically, HHS confined such discretionary requests to "compliance review[s] or complaint investigation[s]. . . ." *Id.* at 57,852. No notice of the proposed revision, hence no invitation for public comment, was made between the time the agency regulations were proposed and finalized. Indeed, when HHS proposed its agency-specific regulations on September 24, 1979, the public was expressly told *not* to submit comments about the self-evaluation requirement, since it must follow the general model. *See* 44 *Fed. Reg.* 55,108 (September 24, 1979).

In general, agencies engaged in rulemaking must signal for notice and comment material changes between the proposed rule and the final rule, above all when those changes are unrelated to the comments received.

HHS did not meet this obligation. The majority explains that it is reluctant to force HHS "through unpromising and unnecessary procedural hoops" of notice and comment because the OMB directive had foreclosed any alternatives to the discretionary requirement embodied in the final rule. *See* Majority Opinion at 13. Yet, although § 553 itself allows agencies to dispense with notice and comment if "good cause" is shown that such proceedings are "unnecessary," [1] HHS made no such claim here; [2] nor is the futility of allowing notice and comment on the modification apparent from the record.[3]

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[1] 5 U.S.C. § 553(b) reads:

> [Notice and comment is not required] when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

[2] In fact, HHS did not even mention the OMB memorandum until appellants-Action Alliance, et al. pointed to its existence in this litigation, four years *after* the HHS actions.

[3] The majority cites Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983), to suggest that the rule change was the " 'logical outgrowth,' " of the proposed rules, hence unworthy of further public proceedings. In the majority's words, "the plausible benefits of a new round of commentary could not justify the delay." *See* Majority Opinion at 13.

Small Refiner involved quite different circumstances. Whereas the modifications in *Small Refiner* clearly came about in response to public commentary, here the revision is obedience to a single, terse and unpublished OMB disapproval memorandum. And the revision in this case has weighty consequences. Under the first proposal, HHS was compelled to require recipients of federal monies to perform self-evaluations; yet under the HHS-specific regulations, HHS has discretion never to order any evaluations, which the record shows has indeed been HHS's policy. Additionally, at the preceding HHS rulemaking stage, from which the revised rules are said to be a logical outgrowth, the public was expressly told *not* to submit comments; similarly, the affected public had no input into the OMB memorandum decision. The majority's fear of a delaying "new

The majority speculates that OMB would have vetoed any more stringent recordkeeping requirement than that promulgated, yet OMB's own letter of disapproval is to the contrary. OMB's reasons for its decision that the compulsory requirement could not stand all stress the inadequate commentary and justification for the mandatory requirement; specifically, OMB criticizes HHS for failing to consider "alternative methods" to the recordkeeping requirement." *See* J.A. at 89. Public comment would have permitted exploration of the "alternative measures" to which OMB alludes, for instances affected persons might have identified for the agency a variety of circumstances or situations when it is most urgent for HHS to require recipients to perform self-evaluations.

Because HHS failed to comply with § 553 when it promulgated its revised agency-specific regulations, and because, unlike the majority, I read the record, and particularly the OMB disapproval order, as supporting, not disminishing, the importance of public participation, I would remand with instructions that HHS seek comment on its proposed modification to the mandatory self-evaluation requirement.

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round" of commentary is ironic: The affected public has yet to be allowed its first round.

The logical outgrowth exception to § 553, which assumes prior, comprehensive public participation, is thus inapposite. None of *Small Refiner's* three purposes underlying § 553 was satisfied here: (1) the revised regulation was not " 'tested by exposure to diverse public comment,' " 705 F.2d at 547 (citing *BASF Wyandotte Corp.*, 598 F.2d at 641); (2) senior citizen groups were unfairly silenced in forming the eventual regulations; (3) and the omission of notice and comment has compromised the evidentiary record for review, as is manifest in the confused chronology and sparse reasoning underlying this provision. *See id.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

C.A. No. 83-00285

No. 87-5251

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, *et al.*,
Appellants

v.

OTIS R. BOWEN, *et al.*

[Filed Jul. 25, 1988]

BEFORE: Wald, Chief Judge; Starr and Williams, Circuit Judges

ORDER

Upon consideration of Appellants' Petition for Rehearing, filed June 23, 1988, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A statement of Chief Judge Wald is attached.

87-5251, *Action Alliance of Senior Citizens of Greater Philadelphia, et al. v. Otis R. Bowen, et al.*

Statement of Chief Judge Wald

Although the impact of the rule involved in this case may be modest, I think that the extension of the "logical outgrowth" theory of bypassing notice and comment announced by the majority lacks legal basis altogether. The logical outgrowth exception assumes that the parties to a rulemaking are reasonably forewarned that the proposed rule could move in the direction of the final result, though that result may differ from the original proposal.

This narrow exception, however, has no application to circumstances similar to this case, where parties are assured that there is no need, indeed no way, for them to comment on a proposed segment of a rule because it is foreordained; yet later that segment emerges quite different, allegedly because of an "external influence." The twists and turns this vaguery of "external influence" might take in future cases are difficult to predict. And the peril is compounded when the external force is itself insulated from all public consideration.

This is my opposition to what I fear is a potentially mischievious and unexplained departure from core administrative law doctrine. *See McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988) (citing line of D.C. Circuit cases "that notice be clear and to the point").

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

C.A. No. 83-00285

No. 87-5251

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, *et al.*,
Appellants

v.

OTIS R. BOWEN, *et al.*

[Filed Jul. 25, 1988]

BEFORE: Wald, Chief Judge, Robinson, Mikva, Edwards, Ruth B. Ginsburg. Starr, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellants' suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellants' suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge D.H. Ginsburg did not participate in this order.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0285

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, *et al.*,
Plaintiffs,

v.

OTIS R. BOWEN, *et al.*,
Defendants.

[Filed May 26, 1987]

MEMORANDUM OPINION

Plaintiffs challenge the implementation of the Age Discrimination Act, 42 U.S.C. §§ 6106-6107 (1982) ("the ADA"), by defendant, the Secretary of Health and Human Services. Certain claims in this action were previously dismissed on the grounds that plaintiffs lacked standing, and this Court subsequently ruled that the remainder of the case had become moot. Following plaintiffs' appeal, the United States Court of Appeals for the District of Columbia determined that plaintiffs have standing to pursue all claims raised in this action and remanded the case for further proceedings. *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986).

The procedural, factual, and statutory background of this case is set out fully in the opinion of the Court of

Appeals and the earlier opinion of this Court dated March 2, 1984. It is not repeated here other than as is needed to make the present analysis clear. Presently before the Court are the cross-motions of the parties for summary judgment. For the reasons discussed below, defendants' motion is granted and plaintiffs' motion is denied.

At oral argument on the cross-motions for summary judgment before this Court on May 7, 1987, plaintiffs ("Action Alliance") challenged defendants' ("the Secretary" or "HHS") action to two bases. First, Action Alliance asserted that HHS violated the provision of the ADA which required that the agency-specific regulations be consistent with the government-wide regulations. ADA § 6103(B)(4). Second, Action Alliance asserted that HHS specific regulations are procedurally defective under § 706 of the Administrative Procedure Act, 5 U.S.C. §§ 500-576 (1982) ("APA").

I. The Self-Evaluation Provision

A. Section 6103 of the ADA

The government-wide regulations mandate that each agency require each non-exempt recipient to complete a written self-evaluation of the recipient's compliance with the ADA within 18 months of the effective date of the agency specific regulations. 45 C.F.R. § 90.43 (1979). The self-evaluation must identify and justify each age distinction imposed by the recipient. *Id.* The recipient is required to take corrective and remedial action whenever a self-evaluation indicates a violation of the ADA. *Id.* The self-evaluation must be made available upon request to the agency and to the public for a period of three years. *Id.* The proposed HHS regulations contained the identical provision at 45 C.F.R. § 91.33.

As was required by the Federal Reports Act, 44 U.S.C. § 3509 (1976) ("Reports Act"), the Secretary submitted

the final government-wide regulations to the Office of Management and Budget ("OMB") requesting clearance of the self-evaluation provision. On February 20, 1980, after the government-wide regulations were published on June 12, 1979, and became effective on July 1, 1979, as well as after publication of the Notice of Proposed Rulemaking ("NPRM") of the HHS specific regulations but before their final publication, the Director of the Office of Management and Budget ("OMB") disapproved the self-evaluation provision in a memorandum to the Office of General Counsel for HHS ("the OMB memorandum").

The reasons for the disapproval as stated in the OMB Memorandum were that HHS "failed to show the practical utility of the requirement . . .", HHS had "not looked at alternative methods to heighten awareness of the provisions of the Act without levying a recordkeeping requirement . . ." and that OMB was "unable to estimate the burden the requirement would impose since the supporting statement says 'little is known about the number of age policies an average recipient imposes . . . .'" Defendants' Brief at Exhibit D. It was further stated that OMB believed other means existed to satisfy the objective of the self-evaluation provision in a less burdensome and costly fashion. If, however, it was shown at a later date that non-compilance with the law was a serious problem, the request would be reconsidered.

As a result of this determination by OMB, the self-evaluation requirement was changed from the original provision contained in the government-wide regulations and the HHS NPRM. The final HHS rule states that recipients *MAY* be required to undertake self-evaluation as part of a compliance review or complaint investigation conducted by HHS. The final HHS rules give HHS the authority to conduct compliance reviews even in the absence of a complaint. 45 C.F.R. § 91.41(a). The compliance review may be as comprehensive as necessary to

determine whether a violation of the ADA and the regulations has occurred. *Id.*

HHS explained in the Federal Register that the change in the HHS final rule was "based upon HHS's determination that to be consistent with the requirements of the Paperwork Reduction Act * of 1980, enacted after the publication of the NPRM, the paperwork burden associated with the self-evaluation provision must be limited to recipients where circumstances indicate—in connection with a compliance review or complaint investigation—the need for the self-evaluation. 47 Fed. Register at 57852 (December 28, 1982).

Action Alliance's first claim with respect to the self-evaluation provision is that the HHS regulations violate § 6103(a)(4) of the ADA because they are inconsistent with the government-wide regulations and consistency between the regulations is a critical element in the enforcement scheme. The Secretary responds that, absent OMB clearance under the Federal Reports Act, the self-evaluation provision of the government-wide regulation was rendered void and unenforceable. Thus, § 6103 (a)(4) must be read to require consistency only with valid and enforceable provisions of the government-wide regulations; therefore, the revision of the HHS regulations does not violate the ADA.

OMB acted within its power under the Federal Reports Act to disapprove the self-evaluation provision of the government-wide regulation. As a result, the self-evaluation provision of the government-wide regulation

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* The Federal Reports Act was amended on December 11, 1984, (sic) by Pub. L. 96-511, 94 Stat. 2812. The Paperwork Reduction Act is the amended version of the Federal Reports Act. At the time of OMB's decision the Federal Reports Act was controlling as the Paperwork Reduction Act did not yet exist. It is therefore unnecessary to decide whether OMB complied with the Paperwork Reduction Act.

was rendered unenforceable. There is no inconsistency between any valid provisions of the two sets of regulations which violate the ADA.

The Court finds, based on the plain language of the Reports Act, that the self-evaluation provision constitutes a collection of "information" as defined in § 3502 of the Reports Act. While Action Alliance is correct that the Reports Act does not expressly state that OMB has the power to disturb a duly promulgated regulation, it does expressly require preclearance by OMB of all collections of information. Reports Act § 3509. It further expressly prohibits an agency from engaging in the collection of information "[t]o the extent, if any, that the Director determines the collection of information by the agency is unnecessary, for any reason . . . ." Reports Act § 3506.

Action Alliance argues that the statutorily required determination by the Director that the information is unnecessary was not made here. When read as a whole, however, the OMB memorandum makes clear that this determination was made even though the OMB memorandum does not use the language of the Federal Reports Act but rather uses the "practical utility" language of OMB Circular A-40. Defendants' Brief at Appendix 1.

OMB acted within its congressionally granted authority under the Federal Reports Act. Since the self-evaluation provisions of the government-wide regulations were rendered unenforceable there would be no purpose served in including the self-evaluation provision in the agency-specific regulations. Even assuming *arguendo* that HHS could have done so, it is clear it would not have received clearance by OMB and such provisions, too, would have been rendered meaningless. Accordingly, there is no inconsistency between the government-wide regulations and the HHS regulations with regard to the self-evaluation provision.

B. Section 553 of the APA

Defendants argue that because it did not alter standards of conduct when it deleted the self-evaluation provision from the HHS regulations, HHS was not engaged in rulemaking; therefore, the notice and comment procedures of the APA did not apply. In support, defendants cite *Alcaraz v. Block*, 746 F.2d 593 (9th Cir. 1984). The Court finds the situation here distinguishable from that in *Alcaraz* and the HHS was engaged in substantive rulemaking when it revised the HHS NPRM and enacted the final HHS regulations.

In *Alcaraz*, the pre-existing statute and the subsequently promulgated agency regulation both required certain action to be taken by the identical persons thus making notice and comment unnecessary since those persons were already bound to comply with the provisions of the statute. Here, in contrast, the entity affected by the OMB decision was the agency itself, while recipients were affected by the subsequently promulgated HHS regulations. Recipients were not bound by the OMB decision and they are entitled to the protections of the APA when agency regulations which govern their behavior are promulgated.

Even so, the Court finds that there was no violation of the APA in this case. Notice of the self-evaluation provision was given in the proposed government-wide regulations and comments were received and considered by HHS at that time. In the NPRM for the HHS regulations it was requested by HHS that comments not be made on the self-evaluation provision again, since that provision was to be included on the basis of the earlier comments received in response to the proposed government-wide regulations. Comments were received on the balance of the provisions of the HHS regulations.

There is no material difference between the HHS proposed regulations, which included the original self-

evaluation provision, and the final HHS regulations, with the revised self-evaluation provision, that would have required a supplementary notice and comment period. Under the final HHS regulations, HHS may still require a recipient to perform a self-evaluation at any time. Contrary to plaintiffs' assertion, there has not been a 'recission' of the self-evaluation requirement. Nor can it be said that the final rule is not a logical outgrowth of the proposed rule. *See American Federation of Labor v. Donovan*, 757 F.2d 330 (D.C. Cir. 1985). Therefore, there has been no violation of the APA.

II. The Compliance Provision

Plaintiffs claim that with the addition of the words "upon request" to the language of the proposed compliance provision HHS has effectively rescinded the compliance requirement and, furtherfore, that the HHS regulations confiict with the government-wide regulations in violation of the ADA. The Court finds that the compliance reporting requirement of the HHS regulations is fully consistent with the corresponding requirements of the government-wide regulations.

"In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *United States v. Larionoff*, 431 U.S. 864, 872 (1977) (citations omitted). The Court finds that HHS has consistently interpreted the provision of the government-wide regulations at 45 C.F.R. § 90.45(a) to require agencies to obligate their recipients to provide compliance information only when requested to do so by an agency. That interpretation is consistent with the language of § 90.45 and also with the parallel provision of § 90.42(a). The "targeted" approach to compliance reporting embodied in 90.34 precludes a reading of § 90.45(a) as anything other than a

requirement to provide information when requested to do so by an agency.

There is then no inconsistency between the compliance reporting requirement in the HHS regulations at § 90.34 (b) and the corresponding provision in the government-wide regulation at § 90.45(a). The HHS specific regulations do not violate the consistency requirement of the ADA. Since the Court finds that the government-wide regulations never contained a mandatory, automatic compliance requirement, HHS has not improperly rescinded or "effectively rescinded" the compliance provision in violation of the ADA.

Judgment will be entered in favor of defendants.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

DATED: May 26, 1987

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0285

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, *et al.*,
Plaintiffs,

v.

OTIS R. BOWEN, *et al.*,
Defendants.

[Filed May 26, 1987]

ORDER AND JUDGMENT

Upon consideration of the parties' cross-motions for summary judgment, supporting and opposing memoranda, the oral arguments of counsel, and the entire record, it is this 26th day of May, 1987,

ORDERED that the motion of defendants for summary judgment be, and hereby is, granted; it is further

ORDERED that the motion of plaintiffs for summary judgment be, and hereby is, denied; and it is further

ORDERED that the complaint of plaintiffs be, and hereby is, dismissed.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

APPENDIX F

PAPERWORK REDUCTION ACT OF 1980

44 U.S.C.

§ 3502.

* * * *

(4) the term "collection of information" means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either—

(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes;

§ 3504. Authority and functions of Director

(a) The Director shall develop and implement Federal information policies, principles, standards, and guidelines and shall provide direction and oversee the review and approval of information collection requests, the reduction of the paperwork burden, Federal statistical activities, records management activities, privacy and security of records, agency sharing and dissemination of information, and acquisition and use of automatic data processing, telecommunications, and other information technology for managing information resources. The authority of the Director under this section shall be exercised consistent with applicable law.

* * * *

§ 3507. Public information collection activities—Submission to Director; approval and delegation

(a) An agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the request for collection of such information—

(1) the agency has taken actions, including consultation with the Director, to—

(A) eliminate, through the use of the Federal Information Locator System and other means, information collections which seek to obtain information available from another source within the Federal Government;

(B) reduce to the extent practicable and appropriate the burden on persons who will provide information to the agency; and

(C) formulate plans for tabulating the information in a manner which will enhance its usefulness to other agencies and to the public;

(2) the agency (A) has submitted to the Director the proposed information collection request, copies of pertinent regulations and other related materials as the Director may specify, and an explanation of actions taken to carry out paragraph (1) of this subsection, and (B) has prepared a notice to be published in the Federal Register stating that the agency has made such submission and setting forth a title for the information collection request, a brief description of the need for the information and its proposed use, a description of the likely respondents and proposed frequency of response to the information collection request, and an estimate of the

burden that will result from the information collection request; and

(3) the Director has approved the proposed information collection request, or the period for review of information collection requests by the Director provided under subsection (b) has elapsed.

(b) The Director shall, within sixty days of receipt of a proposed information collection request, notify the agency involved of the decision to approve or disapprove the request and shall make such decisions, including an explanation thereof, publicly available. If the Director determines that a request submitted for review cannot be reviewed within sixty days, the Director may, after notice to the agency involved, extend the review period for an additional thirty days. If the Director does not notify the agency of an extension, denial, or approval within sixty days (or, if the Director has extended the review period for an additional thirty days and does not notify the agency of a denial or approval within the time of the extension), a control number shall be assigned without further delay, the approval may be inferred, and the agency may collect the information for not more than one year.

§ 3508. Determination of necessity for information; hearing

Before approving a proposed information collection request, the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that

the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information.

§ 3518.

* * * *

(e) Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

APPENDIX G

FEDERAL REPORTS ACT

44 U.S.C.

§ 3502. [Para. 3]

"information" means facts obtained or solicited by the use of written report forms, application forms, schedules, questionnaires, or other similar methods calling either for answers to identical questions from ten or more persons other than agencies, instrumentalities, or employees of the United States or for answers to questions from agencies, instrumentalities, or employees of the United States which are to be used for statistical compilations of general public interest.

§ 3506. Determination of necessity for information; hearing

Upon the request of a party having a substantial interest, or upon his own motion, the Director of the Bureau of the Budget may determine whether or not the collection of information by a Federal agency is necessary for the proper performance of the functions of the agency or for any other proper purpose. Before making a determination, he may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines the collection of information by the agency is unnecessary, for any reason, the agency may not engage in the collection of the information.

§ 3509. Plans or forms for collecting information; submission to Director; approval

A Federal agency may not conduct or sponsor the collection of information upon identical items, from

ten or more persons, other than Federal employees, unless, in advance of adoption or revision of any plans or forms to be used in the collection—

(1) the agency has submitted to the Director the plans or forms, together with copies of pertinent regulations and of other related materials as the Director of the Bureau of the Budget has specified; and

(2) the Director has stated that he does not disapprove the proposed collection of information.

APPENDIX H

AGE DISCRIMINATION ACT OF 1975

42 U.S.C.

§ 6101. Statement of purpose

It is the purpose of this chapter to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance, including programs or activities receiving funds under chapter 67 of Title 31.

§ 6102. Prohibition of discrimination

Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) and section 6103(c) of this title, no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

§ 6103. Regulations

(a) Publication in Federal Register of proposed general regulations, final general regulations, and anti-discrimination regulations; effective date

(1) Not later than one year after the transmission of the report required by section 6106(b) of this title, or two and one-half years after November 28, 1975, whichever occurs first, the Secretary of Health and Human Services shall publish in the Federal Register proposed general regulations to carry out the provisions of section 6102 of this title.

(2)(A) The Secretary shall not publish such proposed general regulations until the expiration of a period comprised of—

(i) the forty-five day period specified in section 6106(e) of this title and

(ii) an additional forty-five day period, immediately following the period described in clause (i), during which any committee of the Congress having jurisdiction over the subject matter involved may conduct hearings with respect to the report which the Commission is required to transmit under section 6106(d) of this title, and with respect to the comments and recommendations submitted by Federal departments and agencies under section 6106(e) of this title.

(B) The forty-five day period specified in subparagraph (A)(ii) shall include only days during which both Houses of the Congress are in session.

(3) Not later than ninety days after the Secretary publishes proposed regulations under paragraph (1), the Secretary shall publish in the Federal Register final general regulations to carry out the provisions of section 6102 of this title, after taking into consideration any comments received by the Secretary with respect to the regulations proposed under paragraph (1).

(4) Not later than ninety days after the Secretary publishes final general regulations under paragraph (a)(3), the head of each Federal department or agency which extends Federal financial assistance to any program or activity by way of grant, entitlement, loan, or contract other than a contract of insurance or guaranty, shall transmit to the Secretary and publish in the Federal Register proposed regulations to carry out the provisions of section 402 of this title and to provide appropriate investigative, conciliation, and enforcement procedures. Such regulations shall be consistent with the final general

regulations issued by the Secretary, and shall not become effective until approved by the Secretary.

(5) Notwithstanding any other provision of this section, no regulations issued pursuant to this section shall be effective before July 1, 1979.

(b) Nonviolative actions; programs or activity exemption

(1) It shall not be a violation of any provision of this chapter, or of any regulation issued under this chapter, for any person to take any action otherwise prohibited by the provisions of section 6102 of this title if, in the program or activity involved—

(A) such action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of such program or activity; or

(B) the differentiation made by such action is based upon reasonable factors other than age.

(2) The provisions of this chapter shall not apply to any program or activity established under authority of any law which (A) provides any benefits or assistance to persons based upon the age of such persons; or (B) establishes criteria for participation in age-related terms or describes intended beneficiaries or target groups in such terms.

(c) Employment practices and labor-management joint apprenticeship training program exemptions; Age Discrimination in Employment Act unaffected

(1) Except with respect to any program or activity receiving Federal financial assistance for public service employment under the Job Training Partnership Act [29 U.S.C.A. § 1501 et seq.], nothing in this chapter shall be construed to authorize action under

this chapter by any Federal department or agency with respect to any employment practice of any employer, employment agency, or labor organization, or with respect to any labor-management joint apprenticeship training program.

(2) Nothing in this chapter shall be construed to amend or modify the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621-634), as amended, or to affect the rights or responsibilities of any person or party pursuant to such Act.

APPENDIX I

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C.

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief state-

ment of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy;

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383.

APPENDIX J

GENERAL REGULATIONS UNDER AGE DISCRIMINATION ACT OF 1975

45 C.F.R.

§ 90.43 What specific responsibilities do agencies and recipients have to ensure compliance with the Act?

(a) *Written notice, technical assistance, and educational materials.* Each agency shall: (1) Provide written notice to each recipient of its obligations under the Act. The notice shall include a requirement that where the recipient initially receiving funds make the funds available to a sub-recipient, the recipient must notify the sub-recipient of its obligations under the Act.

(2) Provide technical assistance, where necessary, to recipients to aid them in complying with the Act.

(3) Make available educational materials setting forth the rights and obligations of beneficiaries and recipients under the Act.

(b) *Self-evaluation.* (1) Each agency shall require each recipient employing the equivalent of 15 or more full time employes to complete a written self-evaluation of its compliance under the Act within 18 months of the effective date of the agency regulations.

(2) Each recipient's self-evaluation shall identify and justify each age distinction imposed by the recipient.

(3) Each recipient shall take corrective remedial action whenever a self-evaluation indicates a violation of the Act.

(4) Each recipient shall make the self-evaluation available on request to the agency and to the public for a period of 3 years following its completion.

* * * *

HHS FINAL REGULATIONS UNDER AGE DISCRIMINATION ACT OF 1975

45 C.F.R.

§ 91.33 Assurance of compliance and recipient assessment of age distinctions.

(a) Each recipient of Federal financial assistance from HHS shall sign a written assurance as specified by HHS that it will comply with the Act and these regulations.

(b) *Recipient assessment of age distinctions.* (1) As part of a compliance review under § 91.41 or complaint investigation under § 91.44, HHS may require a recipient employing the equivalent of 15 or more employees to complete a written self-evaluation, in a manner specified by the responsible Department official, of any age distinction imposed in its program or activity receiving Federal financial assistance from HHS to assess the recipient's compliance with the Act.

(2) Whenever an assessment indicates a violation of the Act and the HHS regulations, the recipient shall take corrective action.

APPENDIX K

[SEAL]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C.

MEMORANDUM

TO: Terry Dowd
Deputy General Counsel
for Regulation Review
Office of General Counsel
Department of Health, Education,
and Welfare

FROM: Jim Tozzi
Assistant Director for Regulatory
and Information Policy

SUBJECT: Request for clearance of Self-Evaluation Requirement of Government-Wide Age Discrimination Act Regulations

We have disapproved the request for clearance of the self-evaluation requirement in the government-wide regulations implementing the Age Discrimination Act for the following reasons:

1) The Department has failed to show the practical utility of the requirement;

2) The Department has not looked at alternative methods to heighten awareness of the provisions of the Act without levying a recordkeeping requirement; and

3) The Department is unable to estimate the burden the requirement would impose since the supporting statement

says "little is known about the number of age policies an average recipient imposes. . . ."

We believe the proposed addition of the Age Discrimination Act to the standard assurances used in conjunction with Federal grants and increased publicity of the provisions of the Act will satisfy the objective of the self-evaluation provision in a less burdensome and costly fashion.

Should HEW at a later date, on the basis of compliance reviews, have evidence that non-compliance with the law is a serious problem, we would be amenable to reconsidering this decision.

cc: Flora Carter, HEW

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No. 88-849

In the Supreme Court of the United States

OCTOBER TERM, 1988

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, ET AL., PETITIONERS

v.

DAVID NEWMAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Prior to April 1, 1981, the Federal Reports Act required, among other matters, that the Office of Management and Budget (OMB) review federal agency information collection activities to determine whether the collection of information is necessary for the proper performance of the functions of the agency. In this case, OMB reviewed and disapproved certain provisions of the Secretary of Health and Human Services' (HHS's) general regulations, applicable to all agencies, for compliance with the Age Discrimination Act (ADA). The Secretary then modified his proposed regulations for HHS compliance with the ADA to conform to OMB's disapproval. The question presented is whether the court of appeals correctly upheld those modifications.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 846 F.2d 1449. The opinion of the district court (Pet. App. 25a-32a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1988. A petition for rehearing was denied on July 25, 1988 (Pet. App. 21a-24a). On October 18, 1988, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including November 22, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Reports Act of 1942 (FRA), 44 U.S.C. 3501 *et seq.* (1976), to ensure that in-

formation needed by federal agencies would be obtained with a minimum burden on the business enterprises and other persons required to furnish the information. 44 U.S.C. 3501 (1976). Congress assigned the Director of the Bureau of the Budget the responsibility for implementing the FRA and later reassigned that responsibility to the Director of the Office of Management and Budget (OMB).

As of 1979, the FRA required all federal agencies to submit their plans for the collection of information to the Director of OMB for approval. 44 U.S.C. 3509 (1976). The FRA prohibited an agency from conducting or sponsoring the activity unless the Director had "stated that he does not disapprove the proposed collection of information" (44 U.S.C. 3509(2) (1976)). If the Director determined that the collection of information by the agency was unnecessary, for any reason, the agency could not engage in the collection of information. 44 U.S.C. 3506 (1976).

On December 11, 1980, Congress passed the Paperwork Reduction Act of 1980 (PRA), Pub. L. No. 96-511, 94 Stat. 2812, with an effective date of April 1, 1981. The PRA amended the FRA to "strengthen the clearance process." S. Rep. No. 930, 96th Cong., 2d Sess. 13 (1980). The PRA is basically similar to the FRA, but it adds new requirements and sets forth OMB's authority and responsibilities with greater clarity and detail. For example, the PRA, unlike the FRA, requires OMB to file public comments on any agency's proposed rule requiring the collection of information and provides that the ultimate decision to approve or disapprove the request must be made publicly available. 44 U.S.C. 3504(h) (4) & (6). The PRA also provides that the Act shall not increase or decrease the authority of OMB "with respect to the substantive policies and programs of departments, agencies and offices, in-

cluding the substantive authority of any Federal agency to enforce the civil rights laws." 44 U.S.C. 3518(e).

2. The Age Discrimination Act of 1975 (ADA), 42 U.S.C. 6101 *et seq.*, prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance. See 42 U.S.C. 6102. The Secretary of Health and Human Services (HHS) oversees this aspect of the ADA and is responsible for issuing general government-wide regulations that serve as a model for each federal agency that administers a program of federal financial assistance. 42 U.S.C. 6103(a). Each agency, including HHS, then issues regulations, specific to the agency, for implementing the ADA. 42 U.S.C. 6103(a)(4).

On June 12, 1979, the Secretary of HEW (HHS's predecessor) published final government-wide ADA regulations. 44 Fed. Reg. 33,776. They contained a provision, 45 C.F.R. 90.43(b), stating that all agencies must require a self-evaluation from all recipients of federal aid within a specified time frame. In this self-evaluation, each recipient would be required to identify and justify each age distinction imposed in the program or activity. Following the publication of the final government-wide regulations, the Secretary submitted the self-evaluation requirement to the Director of OMB for FRA review.

On September 24, 1979, the Secretary published a notice of proposed rulemaking for agency-specific regulations implementing the ADA with respect to financial assistance programs administered by HHS. 44 Fed. Reg. 55,108. The proposed regulations included a provision, patterned on the requirements of the general regulations, that would have required all recipients of federal financial assistance under programs administered by HHS to complete a self-evaluation within 18 months of final promulgation of the HHS-specific regulations. 44 Fed. Reg. 55,115.

On February 20, 1980, OMB exercised its authority under the FRA to disapprove the general government-wide regulations' self-evaluation requirement. Pet. App. 27a, 48a-49a. OMB explained that HHS had "failed to show the practical utility of the requirement," that HHS had "not looked at alternative methods to heighten awareness of the provisions of the Act without levying a recordkeeping requirement," and that OMB was "unable to estimate the burden the requirement would impose since the supporting statement says 'little is known about the number of age policies an average recipient imposes . . .' " (*ibid.*). OMB further stated that it believed that other means existed to satisfy the objective of the self-evaluation provision that would not be as burdensome or costly; however, if it were shown at a later date that non-compliance with the ADA was a serious problem, it would reconsider the request (*id.* at 49a). OMB's disapproval thus invalidated the general government-wide self-evaluation requirement. See 44 U.S.C. 3506 (1976).

HHS published its final HHS-specific regulations on December 28, 1982. See 47 Fed. Reg. 57,850. Since HHS's general regulations were to provide the model for the agency-specific regulations, and OMB had disapproved the general regulations' mandatory self-evaluation requirement, HHS modified its proposed agency-specific self-evaluation requirement to comport with OMB's disapproval. The final regulation required a self-evaluation only when HHS requested it in connection with a complaint investigation or compliance review. See 45 C.F.R. 91.33(b).[1]

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[1] HHS explained that this change was necessary "to be consistent with the requirements of the Paperwork Reduction Act of 1980" (47 Fed. Reg. 57,852 (1982)). OMB had disapproved the general regulations pursuant to its authority under the FRA, but the FRA had since been replaced by the PRA, and HHS accordingly cited that statute.

3. Petitioners brought this action in the United States District Court for the District of Columbia to challenge the HHS-specific regulation. They argued (among other contentions that are not pressed here) (1) that HHS's general government-wide regulations required that the agency-specific regulations contain a mandatory self-evaluation requirement and (2) that Section 553 of the Administrative Procedure Act, 5 U.S.C. 553, required HHS to provide notice and opportunity for comment before it modified its proposed agency-specific rule. The district court ultimately rejected both of those contentions. Pet. App. 25a-32a.[2] The court concluded that OMB acted within its authority under the FRA when it disapproved the self-evaluation provision of the government-wide regulation (Pet. App. 28a) and that HHS properly conformed the agency-specific regulation to that disapproval (*id.* at 28a-29a). The court further concluded that HHS was not obligated to provide additional notice and opportunity for public comment when it made that conforming change because the change was a "logical outgrowth" of the proposed rule (*id.* at 30a-31a).

The court of appeals affirmed the district court's decision. Pet. App. 1a-17a. The court agreed that OMB acted within its authority under the FRA in disapproving the general regulation's mandatory self-evaluation requirement and that since the disapproval denied legal effect to the provision, there was no inconsistency between the

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[2] The government initially moved to dismiss the petitioners' claims on the ground that they had not alleged sufficient injury to their interests to establish standing. The district court adopted the magistrate's recommendation that petitioners lacked standing to challenge the HHS regulations. However, the court of appeals reversed and remanded to the district court for further proceedings. *Action Alliance of Senior Citizens* v. *Heckler*, 789 F.2d 931 (D.C. Cir. 1986).

government-wide and the HHS-specific regulations (*id.* at 4a-10a). The court also concluded that HHS's modification of the self-evaluation requirement was a logical outgrowth of its proposed regulation that did not require additional notice and opportunity for comment (*id.* at 10a-13a), and that HHS was "clearly justified in its implicit view that the plausible benefits of a new round of commentary could not justify the delay" (*id.* at 12a). Judge Wald dissented in part (*id.* at 18a-20a).[3]

ARGUMENT

Petitioners repeat the contentions, rejected twice below, that OMB lacked authority to disapprove the Secretary's mandatory self-evaluation requirement and that the Secretary should have provided notice and allowed additional comment before modifying its agency-specific regulation to conform to OMB's disapproval. Both of those contentions are incorrect. Petitioners' challenge to OMB's disapproval does, however, raise issues related to the government's petition for a writ of certiorari in *Dole* v. *United Steelworkers of America,* No. 88- ____ (filed Feb. 27, 1989). We therefore suggest that the Court hold this petition pending its resolution of the government's petition for a writ of certiorari.

1. Petitioners contend (Pet. 8) that OMB lacked authority under the FRA to review agency information collection activities that do not involve physical delivery of information to an agency. The court of appeals correctly rejected this contention as "pure pettifoggery" (Pet. App.

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[3] Judge Wald agreed that OMB lawfully disapproved the general regulation's mandatory self-evaluation requirement, but she believed that HHS should have sought additional comment on its modification of the agency-specific self-evaluation requirement (Pet. App. 18a-20a).

8a). Petitioners cite nothing in the FRA to support their contention. As the court explained, petitioners "cannot seriously believe that in enacting the Reports Act Congress was concerned solely or primarily with private parties' costs of *mailing* data to Washington; it is the record-keeping and data-gathering that constitute the burden" (*ibid.*). Indeed, OMB and its predecessor, the Bureau of the Budget, have consistently interpreted the term "collection of information" to include recordkeeping and data-gathering regardless of whether the records or data are sent to the agency (*ibid.*). The agency's longstanding reasonable interpretation is, of course, entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

Petitioners also contend (Pet. 9) that "OMB's power to disapprove cannot extend absolutely to a substantive regulation entrusted by law to the Secretary." The court of appeals correctly rejected that contention as well. See Pet. App. 10a. Petitioners rely on Section 3518(e) of the PRA, which states that "[n]othing in this chapter shall be interpreted as increasing or decreasing the authority" of OMB with respect to "the substantive policies and programs" of other agencies. 44 U.S.C. 3518(e). But this case was decided under the FRA, which does not contain that provision. Moreover, OMB did not call into question the Secretary's substantive policies with respect to age discrimination; OMB's disapproval of the self-evaluation requirement was based on its conclusion, pursuant to 44 U.S.C. 3506 (1976), that the Secretary could use other less burdensome methods to achieve his policy objectives. Pet. App. 48a-49a.

In any event, petitioners' FRA contentions do not warrant this Court's review because the PRA, which sets forth OMB's review responsibilities in far greater detail, has now replaced the FRA. Any questions concerning OMB's

paperwork review authority should be evaluated in a case involving the presently operative statute.

2. Petitioners' contention (Pet. 7, 13-14) that the Secretary should have provided additional notice and opportunity for comment before promulgating its final HHS-specific regulation is also without merit. Petitioners, citing this Court's decision in *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), contend that the court allowed "a bypass of standards established by this Court for an agency's rescission of regulations under the Administrative Procedure Act" (Pet. 7). But, as the court of appeals explained (Pet. App. 10a-12a), this case does not involve a rescission of a final HHS-specific regulation; instead, it involves "a change in rules between proposal and final adoption" (*id.* at 11a).

It is well settled that an agency can alter a proposed regulation during that period between proposal and final adoption without a second round of notice and comment if the changes are a logical outgrowth of the proposal or if the advantages of additional comment are outweighed by the public interest in expedition and finality. See *id.* at 11a-12a. See, *e.g.*, *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). As the court of appeals explained (Pet. App. 12a-13a), the Secretary's changes here were a logical outgrowth of the general regulatory developments, and additional comment would not have been a fruitful endeavor. The court's determination, which simply involved the application of a well-settled principle of administrative law to a particular rulemaking, does not warrant this Court's review.

3. Petitioners also contend (Pet. 10-13) that the court of appeals' resolution of the FRA issues "creates a serious conflict in principle" with the Third Circuit's decision in *United Steelworkers of America* v. *Pendergrass*

(*USWA III*), 855 F.2d 108 (1988), which effectively invalidated OMB's disapproval, under the PRA, of certain provisions of the Secretary of Labor's hazard communication standard. Petitioners apparently recognize that since *USWA III* involves interpretation of the PRA, while the present case involves interpretation of the now rescinded FRA, there is no square conflict between the two cases. We agree, however, that the two cases are difficult to reconcile.

The government has filed a petition for a writ of certiorari seeking this Court's review of the *USWA III* decision. See *Dole* v. *United Steelworkers of America,* No. 88-____ (filed Feb. 27, 1989). That petition, unlike the petition here, would allow the Court to examine OMB's authority under the PRA—the presently operative statute. Since the outcome of that examination could shed light on the present case, we suggest that the Court hold the petition for a writ of certiorari here pending the final resolution of the government's petition.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of the Court's resolution of the petition for a writ of certiorari in *Dole* v. *United Steelworkers of America,* No. 88- ____ (filed Feb. 27, 1989).

Respectfully submitted.

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